Loh Eng Leong & Ors v Lo Mu Sen & Sons Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A–02–661 OF 1998
GOPAL SRI RAM, ARIFIN JAKA JJCA AND ABDUL WAHAB J
24 MARCH 2004

Civil Procedure — Judgments and orders — Enforcement — Court of Appeal made order on appeal from High Court — Appellants applied to Court of Appeal to enforce order against respondents — Whether Court of Appeal could enforce order — Whether High Court should enforce order

This motion was for leave to apply for a committal order against the respondents for breach of an order made by the Court of Appeal on 26 July 2001. On 11 September 1998, the High Court at Taiping had dismissed the appellants' application for rectification of the share register of the first respondent. An appeal was brought before the Court of Appeal and it succeeded. The appellants complained that the order has been flouted by the respondents.

Held:

(1) When this court acts in its appellate jurisdiction, any order that it makes is an order that ought to have made by the High Court. It follows that any order made by this court in its appellate jurisdiction must go to be enforced by the court that ought to have made the order, namely, the High Court (see para 5).

(2) The position would be quite different if the order sought to be enforced was one made within the limited original jurisdiction of this court under s 44 of the Courts of Judicature Act 1964. But that was not the case here. Accordingly, at the court's suggestion, counsel for the appellants elected to withdraw the application (see para 8).

[**Bahasa Malaysia summary**

Usul ini adalah untuk kebenaran untuk memohon perintah komital terhadap responden untuk kemungkiran perintah yang dibuat oleh Mahkamah Rayuan pada 26 Julai 2001. Pada 11 September 1998, Mahkamah Tinggi di Taiping telah menolak permohonan perayu untuk pembetulan daftar saham responden pertama. Satu rayuan telah dibuat di hadapan Mahkamah Rayuan dan ia telah dibenarkan. Perayu-perayu telah mengadu bahawa perintah tersebut tidak dipatuhi oleh responden-responden.

Diputuskan:

(1) Apabila mahkamah ini bertindak di dalam bidangkuasa rayuannya, sebarang perintah yang dibuatnya adalah perintah yang sepatutnya dibuat oleh Mahkamah Tinggi. Oleh itu, sebarang perintah yang dibuat oleh mahkamah ini di dalam bidangkuasa rayuannya mesti dikuatkuasakan oleh mahkamah yang patut membuat perintah itu, iaitu Mahkamah Tinggi (lihat perenggan 5).

(2) Keadaan akan menjadi lain jika perintah yang dipohon untuki dikuatkuasakan adalah satu perintah yang dibuat di dalam bidangkuasa asal terhad mahkamah ini di bawah s 44 Akta Mahkamah Kehakiman 1964. Tetapi ini bukan kes di sini. Oleh itu, di atas cadangan mahkamah peguam untuk perayu-perayu memilih untuk menarik balik permohonan itu (lihat perenggan 8).]

Notes

For cases on enforcement of judgments and orders, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3490–3491.

For drawing up and entering judgment and orders, see 1 *Halsbury's Laws of Malaysia*, para [10.9-004].

Cases referred to

Cook and Others' Application (No 2), Re [1986] NI 283 (refd)

Fortescue v McKeown and Others [1914] 1 IR 30 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 44

Dato' Cecil Abraham (Yee Mei Ken with him) (Shearn Delamore & Co) for the appellants

Dato' Bastian Vendargon (V Kalearasu, NK Yong and Aisha Mubarak with him) (Kim & Associates) for the respondents

Appeal from: Saman Pemula No. 24–51 of 1998(T) (High Court, Taiping)

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] This motion which is before us today came before a differently constituted bench of this court on 8 March 2004. The motion is for leave to apply for a committal order against the respondents for breach of an order made by this court on 26 July 2001. In order to appreciate the points taken before us it is important to hearken to the factual background.

[3] On 11 September 1998 the High Court at Taiping dismissed the appellants' application for rectification of the share register of the first respondent. An appeal was brought to this court. It succeeded. As we have just observed this court by its order dated 21 July 2001 directed rectification. The appellants' complaint is that that order has been flouted by the respondents. They want to punish the respondents for contempt of court.

[4] When Dato' Cecil Abraham appeared before this court on 8 March 2004 we put it to him that we have no jurisdiction to entertain this application. In our view the proper forum seised with the jurisdiction is the High Court at Taiping. The reasons are quite obvious.

[5] When this court acts in its appellate jurisdiction, any order that it makes is an order that ought to have made by the High Court. This is the historical consequence of the jurisdiction which evolved in England through the process of the writ of error in the 19th century. It follows that any order made by this court in its appellate jurisdiction must go to be enforced by the court that ought to have made the order, namely, the High Court.

[6] With customary frankness, Dato' Abraham conceded that the authorities are against him. He has assisted us by referring to two Irish cases. The first is *Fortescue v McKeown and Others* [1914] 1 IR 30. The issue in that case was whether the Master of the Rolls sitting at instance had jurisdiction to issue a writ of attachment in dealing with the order of the Court of Appeal. The Lord Chancellor said:

> We are all of opinion that the Master of the Rolls had jurisdiction to make the order which the plaintiffs seek. We are dealing with the case on appeal from the Master of the Rolls, and as we consider that he would have rightly exercised his discretion and directed the writ to issue if he had considered that he had jurisdiction to do so, we will now reverse the order made by him, and direct that a writ of attachment do issue against each of the defendants for disobedience of the order of the 24 April 1913.

[7] The decision in *Fortescue v McKeown and Others* was approved by Hutton J in *Re Cook and Others' Application (No 2)* [1986] NI 283. That was also a case in which the applicant was seeking to enforce in the Queen's Bench of the High Court of Northern Ireland an order of the Court of Appeal of that jurisdiction. This is what Hutton J said in respect of the application:

> Although the present application relates to breaches of the order of the Court of Appeal and not to breaches of the order of the High Court, it is appropriate for this application to be brought before the High Court and not before the Court of Appeal — see *Fortescue v McKeown* [1914] 1 IR 30 and *Pott v Stutley* [1935] WN 140.

[8] The position would be quite different if the order sought to be enforced was one made within the limited original jurisdiction of this court under s 44 of the Courts of Judicature Act 1964. Thus, had there been a refusal in the High Court in a particular case, eg, to grant an injunction and the unsuccessful applicant had approached this court under s 44 and obtained an injunction by way of interim protection, any breach of that injunction could be properly enforced by this court.

[9] But, as we have already pointed out that is not the case here. Accordingly, at our suggestion, Dato' Abraham elected to withdraw his application. Being an ex parte motion, no question of costs arises. None were ordered.

Order accordingly.

Reported by Chew Phye Ken